No. 5019

IN THE

United States Circuit Court of Appeals

2

FOR THE

NINTH CIRCUIT

O. L. SHAFTER ESTATE COMPANY, a Corporation,

Plaintiff in Error,

vs.

W. T. MOONEY, Trustee in Bankruptcy of the Estate of WILLIAM BARTHOLOMEW, Bankrupt,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

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TOPICAL INDEX

INDEX TO AUTHORITIES

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STATEMENT OF THE CASE.

This is a writ of error to the District Court for the Northern District of California in an action brought by W. T. Mooney, as trustee in bankruptcy of the estate of

William Bartholomew, against O. L. Shafter Estate Company, a corporation, to recover the sum of $1764.25, alleged by the trustee to have been paid to the corporation by the bankrupt at a time when he was insolvent, and therefore claimed by the trustee to constitute a voidable preference. The insolvency of the bankrupt at the time of the transaction complained of was conceded, but the defendant contended that no money whatever was paid to the defendant by the bankrupt, that the sum was paid by a third person from his own funds, that the estate of the bankrupt was in no wise diminished by the payment, that the interest of no creditor of the bankrupt was affected by the transaction, and that therefore the transaction was in no sense a voidable preference.

The cause was tried before the Honorable William H. Sawtelle, sitting without a jury, a jury trial having been waived by written stipulation of the parties (Tr. p. 6), and judgment was rendered for the plaintiff as prayed (p. 12) on findings of the Court (p. 9). A formal motion for judgment was duly made by the defendant (p. 64), and proposed amendments to the proposed findings were duly offered by the defendant (p. 66), in all of which the position of the defendant, that the evidence was not only insufficient to warrant a judgment but, on the contrary, negatived any possible preference, was clearly stated. Exceptions were duly taken to the denial of the motion for judgment (p. 65), to the rejection of the proposed amendments to the findings (p. 66), to the signing and entry of the findings (p. 67), and to the entry of judgment for the plaintiff (pp. 67, 68).

Assignments of error covering the matters excepted to were duly filed (p. 68), and the question of the sufficiency of the evidence to support the judgment, raised in the various steps above referred to, is now properly before this Court.

By stipulation of the parties (p. 74), certain of the papers appearing in the typewritten record were omitted from the printed transcript, although conceded to be in proper form and to have been filed in due time. It was further stipulated that certain provisions of a certain lease from the corporation to one Hall, introduced in evidence as Defendant's Exhibit A (pp. 37 et seq.), were substantially in the form embodied in the lease from the corporation to Bartholomew (Plaintiff's Exhibit 1, pp. 14 et seq.), and these provisions were accordingly omitted from the printed transcript (p. 39).

For the sake of brevity, the parties will be hereinafter referred to as the plaintiff and the defendant, as in the lower Court, although their designations are reversed on this writ of error.

There is very little conflict in the evidence introduced on the trial. While the bankrupt Bartholomew was decidedly hostile to the defendant, and endeavored to place his own conduct in the most favorable light, the testimony on all of the essential points in the case stands uncontradicted, and, as we shall show in our argument, is not only insufficient to establish a preferential payment, but actually negatives the claim of any preference.

The defendant corporation is the owner of certain dairying properties in the County of Marin, State of California, which are subdivided into various ranches,

the one particularly referred to in the case at bar being known as the "N" Ranch. Since 1917, the legal affairs of the defendant and the preparation and execution of leases on its behalf have been in the charge of Charles W. Slack, who is the vice-president and general manager of the defendant (p. 54). L. C. Eastman, of Inverness, is the ranch Superintendent for the defendant (p. 37). The defendant has always leased its lands for one year terms, the leases being renewed from time to time if the tenants are satisfactory. When satisfactory, the tenants have been permitted to sell out to other parties satisfactory to the defendant, its policy being not to interfere except to try to keep the outgoing tenant from charging the incoming tenant too much for the good-will of the business (p. 55). It is to be noted that the leases of the defendant provide that they are not assignable without the consent of the defendant, and that the so-called "good-will" arose purely from the custom of the defendant to renew leases for satisfactory tenants, and from the fact that the machinery, equipment and horses on a ranch, which would presumably be suitable for the conduct of operations thereon, would naturally have a greater value in place than if removed, as Judge Slack testified (pp. 60-61). Furthermore, the new tenant in purchasing the property in place would be saved the trouble and delay incidental to the purchase of new equipment.

Bartholomew, the bankrupt, first had a lease of the "N" Ranch, together with the cattle thereon, in 1922, in conjunction with another tenant. In 1923, a new lease was made to him alone, his associate having sold

out, and, again in 1924, a second lease was made to him (pp. 55-6). This lease, which was offered in evidence as Plaintiff's Exhibit A (pp. 14 et seq.), was for the term of one year commencing October 1, 1924, and ending September 30, 1925, and provided for a cash rental of $2500, payable in installments, in addition to 26 of the calves to be selected by the defendant from those born in the season of 1924-5. The cattle which were leased with the ranch comprised 108 cows, 24 two-year-old heifers and 23 yearling heifers. In the spring of 1925, the yearling heifers, 23 in all, mysteriously disappeared, and while Bartholomew claimed that they were lost in a storm and found dead (p. 63), he admitted that he never told Judge Slack that they had been found dead (id.). Eastman made a search for the cattle, but could not find them, and in June, 1925, when Judge Slack spoke to Bartholomew, in the presence of Eastman, about their loss, Bartholomew merely said that they had disappeared and could not be found (p. 41). The disappearance of these heifers, together with Bartholomew's neglect of the cattle otherwise and his failure to make repairs and keep up the property and the non-payment of his rent, caused Judge Slack to become thoroughly dissatisfied with him, and on June 20, 1925, Judge Slack told him that he would have to look for a new tenant (pp. 57-8; p. 41). Bartholomew said that he would do so, and asked Eastman to try and find a new tenant for him (p. 41).

Early in September, 1925, Bartholomew had a talk with one William T. Hall, in which Bartholomew asked Hall to find him a tenant. Soon thereafter, Hall decided

to investigate the property with a view to leasing it himself, and went out to the ranch to look it over. Bartholomew said the ranch was worth $6500, and Hall suggested that he, Hall, might assume Bartholomew's debts amounting to about $5300, and pay the balance in cash. Bartholomew and Hall then went to a bank at Petaluma, to which Bartholomew was indebted, and discussed the matter with the manager (p. 49). Then, according to Hall, he found out that Bartholomew owed a considerable amount of money to other creditors, and the deal "just seemed to blow up" (id.). Bartholomew's version is slightly different. He testified that Hall agreed to buy the ranch for $6500, that he and Hall went to Petaluma to see about Hall raising the money, that the arrangements were all made, but that when he asked Hall for a deposit, Hall refused to make it, saying that Eastman had told him, Hall, not to pay Bartholomew any money (p. 25). Bartholomew then told Hall he would not sell the place (id.), and proceeded to sell some hogs and "some stuff off the ranch" (p. 26), including a set of Fairbanks scales (p. 34). On cross-examination, Bartholomew again stated (p. 33) that the deal for $6500 fell through because Hall would not pay him a deposit.

Meanwhile, Hall had spoken with Eastman, with reference to his acceptability as a tenant, in the event that he should buy Bartholomew out (p. 50). Eastman seemed to think Hall would be acceptable, but stated that he would have to refer the matter to Judge Slack. About the end of September, Hall again took the matter up with Eastman and offered $2200 rent, instead

of the $2500 which was provided in the Bartholomew lease. Eastman then told Hall that there was a claim of $1700 odd which would have to be paid before the ranch would be leased again, and that whoever took the ranch would have to pay this amount in order to get a new lease (id.). Judge Slack had been out of the State, and, on his return, Eastman had taken up with him the matter of a new lease to Hall. Judge Slack first told Eastman that the amount based on the rent owed by Bartholomew would have to be paid by Hall or anyone else who might take the lease. Later, when Hall offered only $2200 cash rent, instead of $2500, Judge Slack added the $300 difference in rent to the amount first arrived at, making a total of $1764.25 to be paid by the new tenant (p. 58).

On September 30th, Hall agreed with Eastman to take the lease on this basis, and Eastman so advised Judge Slack, who prepared a lease to Hall that day, and mailed it to Eastman (p. 59). On the night of September 30th, Eastman saw Bartholomew, asked him if he had come to any agreement with Hall, and, when informed by Bartholomew that no agreement had been reached, advised Bartholomew to see Hall that night, while he still was in possession of the ranch, and to come to the best terms possible (p. 43). Bartholomew did not see Hall that night, but the next morning, October 1st, after Bartholomew's lease had expired, Hall went out to the ranch to take an inventory of the property and see what he could offer Bartholomew for the property. Bartholomew's first testimony as to any amount offered by Hall was that Hall said, "All I can

give you is $4500 for the ranch and for the stuff." (p. 26.) On cross-examination, he quoted Hall as saying, "All the money I can raise is $4500." (p. 34.) Hall's testimony was as follows (p. 51):

> "I told him that $4500 was as much as I would be willing to pay out on the deal. I knew I had to pay $1764.25 to the defendant to get the lease, and all I wanted to pay out on the deal was $4500; I told Bartholomew that; I did not come to any understanding as to how much I was to pay before Bartholomew and I went to Eastman's residence that morning."

Bartholomew was fully advised of the conditions imposed by the defendant for a new lease, although he was mistaken as to the reason for the $300 payment, for he testified (p. 30):

> "Mr. Eastman told Mr. Hall, and of course I knew myself, that before any one could take over the ranch they had to pay that back rent of mine and that $300 for calves which they say that I either lost or stole."

No agreement on the sale was reached at the ranch, and Bartholomew went to Inverness and there consulted some of his creditors. He met Hall later at Eastman's residence, where Hall signed the lease, Defendant's Exhibit A, in duplicate and gave Eastman his check for $1764.25. No agreement was reached between Hall and Bartholomew at Eastman's residence as to the price Hall was to pay Bartholomew for the equipment. As Eastman testified, (p. 44),

> "On that occasion, at my residence, Hall and Bartholomew left my house to discuss the selling

price further. They were discussing it as they left the house and went over towards Martinelli's store."

Hall testified (pp. 51-3):

"Up to the time when I signed the lease, I had reached no conclusion with Bartholomew as to whether or not I would take the remainder of his property, or what price I would pay for it. I recall a conversation with Bartholomew after the sale of the hogs and other property, at which he told me to wait a couple of weeks and get the property cheaper.

"Q. I think you testified, Mr. Hall, that you and Bartholomew had some talk, either before or after the lease was signed on October 1st, about submitting the proposition of how much should be paid to Bartholomew if you bought the property. You did have such a talk with him, did you?

"A. At the time of signing the lease we tried to agree and settle it right there but when we saw that we could not agree and it was time to take the lease we agreed that I sign the lease and square with the company and then if we could not agree we would appear before the creditors and sort of let the creditors decide the price that I should pay.

"Witness—(Continuing.) After my lease had been signed and Bartholomew had allowed his lease to expire, I knew that Bartholomew had no good will to sell, and that there was nothing left for Bartholomew to sell except what remained of his personal property on the ranch.

"I went with Bartholomew to Martinelli's store after I signed the lease and had handed the check over to Mr. Eastman. That check was payable to the order of the defendant for the amount specified as a consideration for the lease. I handed the lease in duplicate back to Mr. Eastman to be executed by the defendant. Perhaps a week or ten days later, I got from Mr. Eastman my copy of the lease executed by the defendant. It might have been earlier than

that. I have with me my copy of the lease which I received from Mr. Eastman. It has been in my possession ever since Mr. Eastman gave it to me.

"When I arrived at Martinelli's store, which is only a short distance from Mr. Eastman's residence, Bartholomew and I talked further about the personal property that was left on the ranch belonging to Bartholomew. The difference between $4500 and what I had to pay the defendant, $1764.25, amounted to $2700 odd, something less than $2800.

"Mr. Martinelli took a hand in the discussion about that time. He asked me if I would not make it $2800, to make it round numbers. I told Mr. Martinelli that I would do so, and then he drew up the bill of sale. Mr. Eastman came in just as we were writing out the bill of sale."

Bartholomew's testimony is substantially the same (pp. 26-7):

"I went down that morning to Inverness, and I met Mr. Hall and Mr. Eastman down there. Mr. Eastman asked me to go up to his house with Mr. Hall. We went up there. Mr. Hall asked me if I wanted to give him theplace for the money. I told him he might as well have it, I guess, or something like that, so Mr. Hall wrote out Mr. Eastman a check for some money. I did not see what it was. We went over to Mr. Martinelli's store and fixed everything in his store for $4500. After the $1700 was paid by Mr. Eastman, there was $2760 left or something like that. Mr. Martinelli and I asked Mr. Hall if he would not make it out for $2800 even money. There was $1400 and some dollars for the rent and $300 for calves which were lost in the 1923 storm, and so he said he would make it for the $2800 even money. I did not see the check Mr. Hall gave Mr. Eastman, but it was supposed to be seventeen hundred and some dollars. In that conversation, they were to get $1400 back rent which I owed and $300 for the calves before Mr. Hall could get the

> lease. That was said in the conversation between Hall and Eastman and myself on that occasion. There were some papers made out between Mr. Hall and myself at Mr. Martinelli's store."

Martinelli's testimony as to the price which was finally agreed upon, is to the same effect (p. 36):

> "Before I drew up the papers they themselves had a difference of a few dollars between 1700 and some odd, and so I told them to make it $2800 even. I suggested to Hall to make it $2800 and make it an even sum."

Judge Slack, knowing that Bartholomew owed a large amount of money, had instructed Eastman not to permit any money to be paid directly to Bartholomew, because he believed that if any money was so paid, "the creditors would not receive a cent of it." (p. 59.) He therefore made it a condition that if any sale of the property were to be made on the ranch, the money was to be paid to someone as a trustee for the creditors; otherwise, Bartholomew had to take his property off the ranch. He did not undertake, however, to exercise any control of any sale that Bartholomew might make if the property were first removed from the ranch (id.). Judge Slack desired to protect the creditors, with many of whom the defendant had satisfactory business relations, in any sale about which he could possibly have anything to say. (pp. 59-60.) Eastman had advised Hall accordingly (pp. 43, 45), and Bartholomew knew of this condition imposed by Judge Slack (pp. 25, 33). This was the reason for Bartholomew's visit to some of his creditors on the morning of October 1st (p. 26). Accordingly, following the signing of the agreement of

sale, Bartholomew executed a document (plaintiff's Exhibit 3, pp. 28-9) appointing Eastman as trustee for the purpose of paying to the creditors the $2800 which was agreed upon. Hall did not have the money at the time, and the money was never paid to Eastman. At a meeting of creditors a few days later, it was suggested that Mr. Gwynn of the bank at Petaluma, the largest creditor, should take the money (pp. 45-6), and Hall subsequently paid it to Gwynn (p. 54).

The record is silent as to the actual value of the property on the ranch, for which Hall paid Gwynn, as trustee, the sum of $2800. The plaintiff made no effort to prove the value of the property. The defendant's offer to prove that Hall had offered to turn the property over to the creditors for $2000 and to take a loss of $800 on it, was promptly met by an objection from counsel for the plaintiff, which was sustained (pp. 46-7). The omission of the plaintiff to prove the value of the property is most significant, as, if the property had been worth more than $2800, there might have been some moral ground of complaint against the defendant, although, as we shall show in our argument, even then there would have been no legal liability on its part.

ARGUMENT.

Before discussing the questions of law involved in the case, we desire to call to the Court's attention the fact that the lower Court did not have the facts clearly in mind when it rendered its oral decision, which appears on pages 63 and 64 of the transcript. In substantiation of this statement, we will quote the oral decision *in extenso,* interpolating our comments thereon in italics.

"I think the evidence clearly shows that there was no intentional wrong on the part of the defendant, but that the effect of the transfer was to create the preference, and thus causing a diminution of the bankrupt's estate. The testimony of Mr. Bartholomew shows he agreed to sell to Mr. Hall for $6500. That was before October 1, 1925. Bartholomew said Hall told him that he went to see Mr. Eastman and that Mr. Eastman told him not to pay any money to him Bartholomew."

While this statement ignores Hall's testimony that the reason he did not buy the place at $6500 was because Hall found out that Bartholomew had a lot of debts other than those Hall was willing to assume as part of the purchase price, it may be that there is some evidence to support the statement, although the fact that Bartholomew, when he took the stand in rebuttal, did not touch on Hall's testimony on this point, is significant.

"Shortly thereafter Hall offered Bartholomew only $4500."

Bartholomew himself testified (p. 34) that "the first talk about $4500 was on the morning after my lease was

up," and quoted Hall as saying "All the money I can raise is $4500" (id.). This being Bartholomew's last statement as to what Hall said about $4500, it must be taken as a correction of his earlier statement (p. 26) that Hall said "All I can give you is $4500 for the ranch and the stuff." Furthermore, Bartholomew knew that Hall did not intend to pay him $4500, for, to use Bartholomew's own language (p. 30)—"At the meeting with Mr. Eastman and Mr. Hall when Mr. Hall turned over to Mr. Eastman a check, I thought that check was for the $1700. Mr. Eastman told Mr. Hall, and of course I knew myself, that before anyone could take over the ranch they had to pay that back rent of mine and that $300 for calves which they say that I either lost or stole."

"Bartholomew says that Mr. Eastman said that before anyone could take over the ranch he had to pay the $300 for the calves, lost or stolen, and the sum of $1400 back rent."

Barring the question of the veracity of Bartholomew's statement as to the purpose of the $300 payment, and the inaccuracy of the amount of rent, which Bartholomew himself testified (p. 25) was "$1400 odd" and again (p. 27) "$1400 and some dollars," we may accept this statement of the Court as nearly correct.

"He further stated that Mr. Eastman said that he, Bartholomew, had better sell to Mr. Hall for the $4500. Mr. Eastman does not deny that."

The Court was clearly wrong here. According to both Bartholomew (pp. 34-5) and Eastman (p. 43), Eastman's advice to sell was given to Bartholomew on the

night of September 30th, before the amount of $4500 had even been mentioned. Bartholomew's testimony does not contain a single word about Eastman advising him to sell for any particular sum, and his testimony with respect to the conversation at Eastman's house on the morning of October 1st contains no reference to any advice by Eastman on that occasion. The only conversation between Eastman and Bartholomew that morning which appears in the record is the testimony of Eastman (p. 44) that he asked Bartholomew whether he was ready to leave and Bartholomew's reply in the affirmative. So far as the price was concerned, according to Eastman (id.), Hall and Bartholomew were still discussing it when they left his house. This is corroborated by Bartholomew's statement (p. 27) that "we went over to Mr. Martinelli's store and fixed everything in his store for $4500;" and the price of $2800 was fixed after Martinelli and Bartholomew had asked Hall to make it "$2800 even money."

"As a matter of fact, he (Eastman) says in his testimoney in substance that he did tell Hall not to pay Bartholomew any money, that he was in debt; he says that he advised Bartholomew to come to the best terms possible. Mr. Hall says that Mr. Eastman told him that he would have to pay back rent before he could get the lease. Mr. Hall further stated, if I remember correctly, that he told Bartholomew that $4500 was all he would pay on the deal."

These statements of the Court are correct, but they necessarily negative the notion that Hall agreed to pay Bartholomew $4500, and they certainly do not warrant

the concluding remarks of the Court that "considering all the facts, I think plaintiff is entitled to judgment."

We appreciate the finding of the lower Court that "there was no intentional wrong on the part of the defendant," but we regret the fact that the Court did not examine the authorities submitted by us on the argument before rendering its decision. In view of the fact that Judge Slack had protected the creditors to the extent of requiring that no money should be paid to Bartholomew for any sale which might take place of property on the defendant's ranch, the Court might have assumed that Judge Slack, in his dual capacity of general manager and attorney for the defendant, possibly had good authority for his actions on behalf of the defendant, that he was neither intentionally nor unintentionally taking any advantage of, or obtaining any preference over, the creditors of Bartholomew, and that he was not proceeding without an exact appreciation of the rights and duties of the defendant.

The defendant's position, at the time of the transactions in question was, and ever since has been, as follows:

1. As the owner of the ranch, the defendant had the right to impose any condition it might see fit upon a new tenant as a prerequisite to granting him a lease.

2. The money that the defendant received was never part of the bankrupt's estate, but was the sole and exclusive property of Hall.

3. The payment by Hall to the defendant, while it may have reduced the amount which Hall might otherwise have been willing to pay to Bartholomew, in no manner effected a diminution of the bankrupt's estate.

4. The payment by Hall to the defendant, while based in part on the amount of back rent due from Bartholomew, was not a discharge of Bartholomew's indebtedness.

These propositions we will take up in the order of their statement.

1. *As the owner of the ranch, the defendant had the right to impose any condition it might see fit upon a new tenant as a prerequisite to granting him a lease.* This is a self-evident proposition, which requires the citation of no authorities. The only thing which can restrict an owner of property in his complete control and distribution is an outstanding lien or interest therein, contractual or otherwise. As Bartholomew's lease contained a covenant against assignment (Plaintiff's Exhibit I, paragraph 3, pp. 3-4, and paragraph 12, p. 24), he had no assignable interest in the property even during the term of his lease, and as his lease expired on September 30th, and the lease to Hall was made on October 1st, no one had any right on that date to interfere with the freedom of the defendant to contract with respect to its property in any way it chose.

2. *The money that the defendant received was never part of the bankrupt's estate, but was the sole and exclusive property of Hall.*

It appears from the evidence, without contradiction, that Hall paid to Eastman the sum of $1764.25 by writing out his personal check in favor of the defendant on his own bank account. Bartholomew never had any part of this sum in his possession, and, in fact, did not know the amount of the check when it was delivered (pp. 26-7). We are utterly at a loss to conceive how this payment by Hall to the defendant out of his own funds could have been made the basis of the finding of the Court (p. 10) that

> "on or about said 1st day of October, 1925, and while so indebted to defendant, *the bankrupt transferred to the defendant, out of the property of the bankrupt, which was subject to the claims of the said general creditors the sum of $1764.25,* in full payment of such antecedent general debt, so due the defendant as aforesaid, and thereby diminished the estate of the bankrupt to that extent."

How can it be said that the money in bank belonging to Hall, upon which the check was drawn, was either the property of Bartholomew or subject to the claims of Bartholomew's creditors? We confess that we cannot answer this question. The payment was not made at the direction or request of Bartholomew, but was made because the defendant required it as part of the consideration for the execution of the lease, as the first paragraph of the lease clearly provides (Defendant's Exhibit A, p. 38). The only reason for Bartholomew's

presence at the time the lease was signed clearly appears from Eastman's testimony (p. 44):

> "Before I asked Hall to sign the lease, I asked Bartholomew if he was ready to leave the ranch. He said he was, that all he had to do was to go out and get his suitcase and he was going that afternoon."

Eastman manifestly did not want to take any money from Hall until he was sure that Bartholomew was going to leave peaceably. There was no question in anyone's mind as to the fact that Bartholomew had to go, for, as Judge Slack testified (p. 60) Bartholomew

> "Knew perfectly well from what I have told him that he would have to quit after the 30th, because he could not get a new lease, and we would run the ranch ourselves if we could not get a new tenant."

The record does not contain a single word from which it might be inferred that Bartholomew had anything to do with the closing of the deal between Hall and the defendant. He handled no money, he gave no directions to either Hall or Eastman, and he manifested no interest in the transaction. All that he did was to have some discussion with Hall as to the amount his creditors were to get from the "stuff on the ranch."

It was evidently the theory of the plaintiff on the trial that there was a binding agreement of sale between Bartholomew and Hall for $4500. Conceding for the moment that such was the fact, such an agreement would have been merely an executory agreement of sale and could have given Bartholomew no claim

against or ownership in, any particular funds belonging to Hall. Bartholomew's only remedy for the non-payment of the total purchase price would have been to sue Hall for the unpaid balance. But the evidence clearly shows that there was no such agreement. At the risk of seeming tedious, we will again quote all the testimony on the $4500. Bartholomew testified on direct examination (p. 26):

> "So the next morning Mr. Hall came out to the ranch. He said, 'I cannot pay you the $6500.00. Mr. Eastman told me to take a pencil and paper and take down the stuff on the ranch and just give you what the stuff is worth on the ranch.' I said, 'No. No pencil and paper will you use here.' *He said, 'All I can give you is $4500 for the ranch and for the stuff.' So I did not know what to do about it.*
>
> "I went down and spoke to Mr. Martinelli, Mr. Grandi and Mr. Scilacci, who were creditors of mine. I told them the story.
>
> "I went down that morning to Inverness, and I met Mr. Hall and Mr. Eastman down there. Mr. Eastman asked me to go up to his house with Mr. Hall. We went up there. *Mr. Hall asked me if I wanted to give him the place for the money. I told him he might as well have it, I guess, or something like that,* so Mr. Hall wrote out Mr. Eastman a check for some money. I did not see what it was. *We went over to Mr. Martinelli's store and fixed everything in his store for $4500.*"

On cross-examination, Bartholomew testified (p. 34):

> "The first talk about $4500 was on the morning after my lease was up. Mr. Hall came out to my place about 8 o'clock in the morning. He said, 'Bill, I was talking to Mr. Eastman and he told me to come out and get a pencil and paper and take down the stuff you have on the ranch and offer you what-

ever we find the stuff is worth.' I told him that he would not do anything of the sort. After a while he said, *'All the money I can raise is $4500.'* So I didn't know what to say, and I went down and talked it over with Mr. Martinelli, and he told me to let the thing go if I wanted to. That was after my lease expired. It was on October 1st.

"The first talk I ever had with Hall about $4500, the new price, was on this morning after the lease was up."

Eastman testified concerning the $4500 as follows (p. 44):

"Hall and Bartholomew had some discussion about the purchase by Hall of the remainder of Bartholomew's personal property on the ranch. Hall told Bartholomew that he was not going to give him—I think he mentioned $4500, or something of that sort. He said he was asking too much for the ranch, and that he was not going to give him as much as he asked for it. *Hall said that he would not pay altogether more than $4500.* He did not say anything about the amount he paid the defendant. That is all the conversation I recall."

Hall's testimony was as follows (pp. 50-51):

"I saw Bartholomew the next morning, after his lease had expired. I went out to his ranch and saw him there. It was understood that I was to have the ranch, and his lease had expired, and we were to go to Mr. Eastman to prepare for the signing of a new lease. Bartholomew did not seem very much interested in how much he got—it was to go to the creditors. *I told him that $4500 was as much as I would be willing to pay out on the deal. I knew I had to pay $1764.25 to the defendant to get the lease, and all I wanted to pay out on the deal was $4500; I told Bartholomew that;* I did not come to any understanding as to how much I was to pay before Bar-

tholomew and I went to Eastman's residence that morning. While I was at the ranch, Bartholomew told me all he had to get was his suitcase. I signed the lease on October 1st, when Bartholomew and I went to Eastman's residence.

"Up to the time when I signed the lease, I had reached no conclusion with Bartholomew as to whether or not I would take the remainder of his property, or what price I would pay for it."

And again (pp. 51-2):

"At the time of signing the lease we tried to agree and settle it right there but when we saw that we could not agree and it was time to take the lease we agreed that I sign the lease and square with the company and then if we could not agree we would appear before the creditors and sort of let the creditors decide the price that I should pay.

"After my lease had been signed and Bartholomew had allowed his lease to expire, I knew that Bartholomew had no good will to sell, and that there was nothing left for Bartholomew to sell except what remained of his personal property on the ranch."

We have already quoted the remainder of Hall's testimony as to closing up the deal at Martinelli's office. From the foregoing it is obvious—

(1) That no deal between Hall and Bartholomew was concluded at the ranch for any price;

(2) That no such deal was concluded in Eastman's residence;

(3) That Hall never offered Bartholomew $4500 for his property;

(4) That the deal was closed at Martinelli's store; and

(5) That the final and only price agreed on was the

sum of $2800, which is set forth in the written agreement, Plaintiff's Exhibit 2 (pp. 27-8).

The only language in the record which could possibly be construed, or rather misconstrued, into an offer of $4500, is Bartholomew's first statement that Hall said "All I can give you *for the ranch* and for the stuff is $4500." In view of Hall's testimony and Bartholomew's admission that they both knew that Hall had to pay some $1700 for the lease, and they both knew that Bartholomew had no interest in the ranch, this language cannot be construed into an offer of $4500 for the "stuff," particularly in view of Hall's statement, immediately preceding the so-called offer, to the effect that Eastman told him to take pencil and paper and inventory the stuff and give Bartholomew just what it was worth. Bartholomew's subsequent version of Hall's remarks, namely, that Hall said that all he could *raise* was $4500, is undoubtedly the correct statement of what transpired, for it accords exactly with Hall's testimony on the subject. If, after Hall had taken the stand and told his story, there had been any doubt as to exactly what occurred, the plaintiff had an opportunity to question Bartholomew on the point, but he did not touch it when Bartholomew took the stand in rebuttal. Therefore this Court should properly consider that Bartholomew's statement on direct examination, insofar as it was inconsistent with Hall's statement, should be deemed to have been corrected and superseded by Bartholomew's later testimony on cross-examination.

Even if it were the duty of the Court to go beyond

the reasonable construction of the record in an endeavor to uphold the lower Court, and to accept Bartholomew's first statement as a definite offer of $4500 for the "stuff" alone, (which, by the way, ignores the possibility that the word "you" contained in the alleged offer might have been used by Hall in the plural as "you, Bartholomew, the owner of the stuff, and you, the defendant, the owner of the ranch"), there was no acceptance of the offer, for Bartholomew "did not know what to do," and went off to consult his creditors.

The only other language in the record which can be construed as a renewal of any offer was Bartholomew's statement that, at Eastman's residence, Hall asked him if he wanted "to give him the place for the money," and that he replied that Hall "might as well have it," or something like that. The amount of money referred to was not specified, and while Bartholomew said that they fixed it up at the store for $4500, it is obvious that he meant that they fixed it up on an outlay of approximately $4500 by Hall. Assuming that the written agreement of sale (Plaintiff's Exhibit 2, p. 27), could be varied by parol, it is evident that Bartholomew's statement is inaccurate, because the $2800 provided in the agreement, added to the $1764.25 paid by Hall to the defendant, totals $4564.25. The truth is again with Hall's and Eastman's testimony that Hall and Bartholomew came to no agreement at Eastman's residence, and that the final and only agreement was embodied in the written agreement of sale, which was concluded after Martinelli had requested Hall to agree to pay an even $2800.

3. *The payment by Hall to the defendant, while it may have reduced the amount which Hall might otherwise have been willing to pay to Bartholomew, in no manner effected a diminution of the bankrupt's estate.*

Ae we have already pointed out, Bartholomew owned nothing but the personal property on the ranch on October 1st, when the payment to the defendant was made by Hall. His lease was up; his good will, so-called, was gone, as Hall knew (p. 52), and he had the option of selling his personal property or moving it off the ranch. The defendant could have compelled him to surrender possession of the ranch and to move off his personal property, but, knowing that, as Judge Slack testified, the property in place on the ranch ready for use would have a much greater value and would bring more money for the creditors if sold in place, Bartholomew, with the assent of the defendant, sold it to the incoming tenant. If, after Hall had paid the defendant the $1764.25, Bartholomew and Hall had not come to an agreement for the sale of the personal property, there was nothing in the world to prevent Bartholomew from moving the stuff off and disposing of it to any other person for any price he might be able to get. We challenge counsel for the plaintiff to show any change in Bartholomew's position or in his assets which resulted from the payment by Hall to the defendant and the execution of the lease.

The truth of the matter is that Hall was willing to pay the defendant a bonus of $1764.25, or any reasonable amount the defendant might fix, in order to get a one-year lease, because he knew that it has never been

the custom of the defendant to dispossess a satisfactory tenant, and having confidence both in his own ability to run the ranch satisfactorily and in the continuance of the friendly attitude of the defendant toward its good tenants, he felt that he could afford to pay an amount nearly equal to one year's cash rent for the privilege of becoming a tenant on the ranch.

4. *The payment by Hall to the defendant, while based in part on the amount of back rent due from Bartholomew, was not a discharge of Bartholomew's indebtedness.*

Eastman's testimony (p. 40) is that the $1764.25 "was based on the $1464.25 which was still due from Bartholomew and $300 based on the fact that the rental of the ranch had to be reduced from $2500 to $2200"; and (pp. 43-2) "as a result of my conversation with Judge Slack, I told Hall that he could have the ranch for a rental of $2200 by paying $1700, or a little over, as a consideration for a new lease to him."

Judge Slack testified (p. 56):

> "I fixed the amount of the consideration named in the lease on the basis of $1464.25, the back rent, which we have been unable to collect from Bartholomew, and the $300 difference between that sum and the amount specified in the lease as a consideration, was due to the fact that the normal cash rent of the property was and had been for some time $2500 a year. Hall, by reason of the run-down condition of the property and the loss—missing—of a whole herd of stock, besides other stock, refused to pay more than $2200. That established, for the time being and for some time in the future, the cash rent of $2200. Consequently, the difference for one year,

to wit, $300, was added on, by my insistence, to the cash consideration which Hall or anybody else would have to pay for getting the lease."

The lease itself (Defendant's Exhibit A, p. 38) describes the $13,764.25 as a further consideration for the lease. Nowhere does it appear in the record that the defendant gave Bartholomew any receipt or acquittance for the rent at any time, or offered to do so. While Judge Slack, before the creditors claimed the $1764.25, individually intended to waive the claim of the defendant for back rent, he reserved the right to make the claim and so told the creditors (p. 62). While Bartholomew testified (p. 27) that the defendant was "to get $1400 back rent which I owed," his statement could not bind the defendant, and there is nothing in the record which can be construed as a release of Bartholomew's indebtedness to the defendant.

In the foregoing pages we have discussed the evidence in this case at somewhat greater length than is usual in the ordinary appeal, for the reason that there is no question of law involved in the appeal which admits of dispute. The proposition of law upon which we rely is one that is uniformly supported by the Bankruptcy Act itself, by the text books and by all of the decisions, without exception. This proposition is as follows:

In order that there may be a voidable preference, there must be a transfer of the property of the bankrupt, not of a third person, and the transfer must effect a diminution of the estate of the bankrupt.

That the transfer must be one of the property of the bankrupt clearly appears from the language of the Bankruptcy Act itself. Section 3 of the Act provides, in part, as follows:

> "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of *his property* with intent to hinder, delay, or defraud his creditors, or any of them, or (2) transferred, while insolvent, any portion of *his property* to one or more of his creditors with intent to prefer such creditors over his other creditors." (Italics ours.)

In both Subdivision a and Subdivision b of Section 60 of the Act, reference is made to a person "having made a transfer of any of *his* property"; and in Section 70e of the Act it is provided that "the trustee may void any transfer by the bankrupt of *his* property."

We quote the following from the text books:

> "The second act of bankruptcy consists of a debtor transferring while insolvent any portion of *his property* to one or more of his creditors with intent to prefer such creditor or creditors over his other creditors. . . . In addition to this *it must be shown that the transfer results in the depletion of the debtor's estate,* and that the creditor to whom the transfer is made thereby secures an undue advantage over other creditors of the same class. As in the case of the other acts of bankruptcy it must have been committed within the four months preceding the filing of the bankruptcy petition. *The interdicted transaction here must be between a debtor and his creditors."* (Italics ours.)

1 *Collier on Bankruptcy,* p. 136 (13th ed.).

"The preferential transfer must result in the depletion of the debtor's estate, so as to leave the other creditors without property out of which their claims may be paid. *If there is no depletion of the estate, the creditors cannot complain. . . . The transfer must consist of the bankrupt's* OWN PROPERTY *to constitute a preference;* payment of a note of a bankrupt by an indorser would not be sufficient; nor would payment by an attorney, out of his own funds, of a claim against his client, constitute an act of bankruptcy by the client." (Italics ours.)

Id. p. 140.

"Some portion of the debtor's property must have been appropriated by the transaction, and the insolvent estate thereby diminished. Preference implies appropriation of assets and depletion of the trust fund thereby." (Italics ours.)

4 *Remington on Bankruptcy,* Sec. 1630 (3d ed.).

"Of course, the payment of the bankrupt's debt by a third party, *where no property of the bankrupt was transferred* to such party, is not a preference; the third party simply becomes a creditor in place of the original creditor." (Italics ours.)

Id. Sec. 1649.

"To constitute a preference voidable by the trustee in bankruptcy, (1) there must have been an act of the debtor in procuring or suffering the entry of a judgment against him or in making a transfer of *his property."* (Italics ours.)

Black on Bankruptcy, p. 595 (1924 ed.).

"An essential element of a preferential transfer voidable under Section 60 is that the transfer be

made *by* an insolvent person to or for the benefit of his creditor.

"A transfer by a person other than the bankrupt to the creditor does not consitute a preference." (Italics ours.)

1 *Loveland on Bankruptcy,* Sec. 496.

"In order to establish a voidable preference, *it is necessary that the debtor shall have transferred to a creditor some portion of his own property* which his other creditors had a right to subject to the payment of their claims." (Italics ours.)

7 *Corpus Juris,* Sec. 266, p. 165.

The earliest case in the Supreme Court of the United States, which is distinctly in point, is the case of *New York National Bank* vs. *Massey,* 192 U. S. 138, where the Court, in sustaining the right of a bank to apply the balance of a regular bank account in partial satisfaction of a debt due from a bankrupt at the time of the filing of the petition in bankruptcy, held that the fact that, by such application, the bank received a greater proportion of its debt than other creditors, did not operate to create a preferential transfer, because the estate of the bankrupt was not diminished by such application and because there was no transfer of the property of the bankrupt, the Court saying (p. 147):

"The law requires the surrender of such preferences given to the creditor within the time limited in the act before he can prove his claim. *These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminu-*

> *tion of the bankrupt's estate.* It is such transactions, operating to defeat the purposes of the act, which under its terms are preferences." (Italics ours.)

In the case of *Mason* vs. *National Herkimer County Bank,* 172 Fed. 529, decided by the Circuit Court of Appeals for the 2nd Circuit, Mason, as trustee in bankruptcy of the Newport Knitting Company, sued the bank to set aside an alleged voidable preference, arising out of the payment by the Titus Sheard Company to the bank of the amount of indebtedness of the Newport Knitting Company on a note to the Sheard Company, which had been endorsed by the latter company to the bank. The two companies were engaged in the same general character of business, and several persons held offices and were stockholders in both companies. At the time of the payment of the note by the Sheard Company, that company was indebted to the Newport Company on an open account, and it credited itself on the open account with the amount of its payment to the bank. The Circuit Court of Appeals, in holding that the transaction did not constitute a voidable preference, said (p. 530):

> *"The one thing absolutely essential to a preference is that the bankrupt transfer some portion of his property to the creditor. If the creditor receive none of the bankrupt's property, there is no preference. And that is the primary difficulty with the complainant's case.* The defendant bank received no property or money of the Newport Company. The Sheard Company as indorser of the note took up and paid its own funds therefor—funds in which the Newport Company had no interest whatever. *It is true that the Sheard Company at the time it paid*

the note was indebted to the Newport Company, but that in no sense made its funds the property of the latter. An unsecured creditor has no interest in his debtor's property until he has sequestered it. The money which the defendant received belonged to the Sheard Company, and not to the bankrupt. It follows, then, that there was no preference unless that which was actually done can be treated as the equivalent for something else." (Italics ours.)

The case was taken to the Supreme Court under the title of *National Bank of Newport* vs. *National Herkimer County Bank,* 225 U. S. 178. Mr. Justice Hughes, in affirming the judgment of the Circuit Court of Appeals, said (pp. 184-5):

"But, unless the creditor takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished, the creditor cannot be charged with receiving a preference by transfer. Western Tie & Timber Company vs. *Brown,* 196 U. S. 502, 509; *Rector* vs. *City Deposit Bank,* 200 U. S. 405, 419. 'These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminution of the bankrupt's estate.' *N. Y. County Bank* vs. *Massey,* 192 U. S. 138, 147.

"Here, the payment to the bank did not proceed from the bankrupt, the Newport Knitting Company. The Titus Sheard Company had a standing quite apart from its relation to the Newport Knitting Company as a debtor in the account. In the transaction with the bank, the Titus Sheard Company acted on its own behalf. As the holder of the original note, that company had endorsed it to the bank, taking for its own benefit the proceeds of the discount. Its obligation as endorser was continued by the renewals, and to secure the bank on the last renewal it had deposited its own collateral. It took up the

note with its own funds and received back the security. Neither directly nor indirectly was this payment to the bank made by the Newport Knitting Company, and the property of that company was not thereby depleted.

"The fact then is not, as it is contended, that 'the bankrupt parted with property to the amount of the note and the bank received it,' but rather that the bankrupt parted with nothing, and the bank received the money of the endorser and redelivered to the endorser the paper and collateral." (Italics ours.)

In the case of *Continental etc. Trust & Savings Bank vs. Chicago Title & Trust Co.,* 229 U. S. 435, the Supreme Court had under consideration the validity of an arrangement made between the appellant's predecessor and Anderson & Company, grain brokers, with reference to the transfer of certain brokers' margin certificates of the bankrupt, Prince, which had been deposited with the bank as collateral for dealings in grain on the Chicago Board of Trade. The Court, in holding that the substitution by Anderson & Company of its margin certificates for those of the bankrupt, did not appear to have diminished the bankrupt's estate in any way and therefore did not constitute a voidable preference, although the indebtedness of Prince to the bank thereon was satisfied by the transfer, said (p. 443):

"This case must be dealt with in the light of certain principles, established by decisions of this court, in determining the applicable provisions of the Bankruptcy Act. *To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting with the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt's estate. New York County Na-*

tional Bank vs. *Massey,* 192 U. S. 138, 147; *Newport Bank* vs. *Herkimer Bank,* 225 U. S. 178, 184." (Italics ours.)

And again (229 U. S. 444):

> "*The fact that what was done worked to the benefit of the creditor, and in a sense gave him a preference, is not enough, unless the estate of the bankrupt was thereby diminished. New York County National Bank* vs. *Massey, supra.*" (Italics ours.)

The latest decision of the Supreme Court on the proposition that the transfer must be one of the bankrupt's own property in order that there may be a voidable preference, is the case of *Bailey* vs. *Baker Ice Machine Co.,* 239 U. S. 268, where the court, following its previous decisions hereinabove quoted, said (p. 273):

> "The question next to be considered is whether the contract operated as a preferential transfer by Grant Brothers within the meaning of Sec. 60b of the *Bankruptcy Act,* as amended June 25, 1910, c. 412, 36 Stat. 838, 842, . . . *The Section leave no doubt that to be within its terms the transfer must be one which a bankrupt makes of his own property* and which operates to prefer one creditor over others; and if further light be needed there is a declaration in the *Bankruptcy Act,* July 1, 1898, 30 Stat. 544, 545, Sec. 1, clause 25, that the word 'transfer' shall be taken to include every mode 'of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.' *It therefore is plain that Sec. 60b refers to an act on the part of a bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor and thereby diminishes the estate which the Bankruptcy Act seeks to*

apply for the benefit of all the creditors. New York County National Bank vs. *Massey,* 192 U. S. 138, 147. Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs but the Baker Company's. The ownership was not transferred, but only the possession, and it was transferred to the bankrupts, not from them. Being only conditional purchasers, they were not to become the owners until the condition was performed. No doubt the right to perform it and thereby to acquire the ownership was a property right. But this right was not surrendered or encumbered. On the contrary, it remained with the bankrupts and ultimately passed to the trustee, who was free to exercise it for the benefit of the creditors. So, there was no diminution of the bankrupt's estate." (Italics ours.)

In order not unduly to prolong this brief, we cite, without quoting therefrom, the following decisions, in each of which a payment or transfer of the property of a third person was held not to constitute a preference:

Dressel vs. *North State Lumber Co.,* 119 Fed. 531, 534 (D. C., E. D. of N. C.);

In re Hines, 144 Fed. 543, 547 (D. C., W. D. of Pa.);

Catchings vs. *Chatham National Bank,* 180 Fed. 103, 104 (C. C. A., 2d Cir.);

Aiello vs. *Crampton,* 201 Fed. 891, 893 (C. C. A., 8th Cir.);

In re Grocers' Baking Co., 266 Fed. 900, 909 (D. C., M. and N. D. of Ala.);

Miller vs. *Fisk Tire Co.,* 11 Fed. (2d) 301, 304 (D. C., D. of Minn.).

The early case of *In re Pearson,* 95 Fed. 425 (D. C., S. D. of N. Y.), presents facts somewhat analogous to those in the incident case. The case arose on a petition to have Pearson declared a bankrupt because of an alleged preference arising out of the sale by Pearson to one Knox of his leasehold interest in certain hotel property, together with the furniture situate therein. The purchase price, amounting to $9000, was paid partly in cash and partly in notes, which were immediately applied by Pearson to the payment of certain back rent due the owner of the property and certain water taxes chargeable against the property. It appeared from the terms of the lease that it could not be assigned without the consent of the landlord, and the payments of the debts, which were claimed to be preferences, were the necessary conditions to obtain the landlord's consent to the assignment. In holding that the payments did not constitute preferences, and therefore that an act of bankruptcy was not established and the petition should be dismissed, the Court said (p. 426):

> "The lease produced showed that it could not be assigned by the defendant or transferred without the consent of the landlord. It had nearly three years to run, and it was the most valuable asset. In this situation it is manifest that nothing whatever could be realized from the lease except through the landlord's assent to a transfer, which could not be obtained except on payment of the back rent. A transfer to the purchaser, leaving the purchaser to pay the back rent, would necessarily involve the deduction of so much from the purchase price payable to the defendant for the sale of the property; so that evi-

dently it was immaterial whether the transfer took that shape, or whether the purchaser should pay the whole $9000 to the defendant, he at the same time paying off the back rent and water charges and other incidental expenses of the transaction. The latter was the course actually adopted. The lease was transferred to one Knox who paid the $9000 partly in cash, and partly in notes, which were in part immediately applied to pay off the back rent, taxes, and charges connected with the sale. The payment of all these was a necessary condition of realizing anything from the leasehold property, or obtaining the assent of the landlord. *They were all paid from Knox's money and notes,* and in their essential nature these payments were not preferences, but merely a means of making sale of the leasehold, and realizing what was possible from it. The alleged act of bankruptcy not being established, the petition should, therefore, be dismissed, but in this case without costs." (Italics ours.)

From the foregoing authorities, it is manifest that when Hall paid to the defendant the sum of $1764.25 in order to obtain a lease of the defendant's property, there was no diminution of the bankrupt's estate. On the contrary, it was this payment which made possible the sale from Bartholomew to Hall of Bartholomew's personal property for the sum of $2800. Hall never would have bought the property except to use it on the defendant's ranch, and had Hall not used his own funds to pay the defendant the cash consideration demanded for the lease, Bartholomew would have had on his hands a miscellaneous lot of personal property of a greatly depreciated value.

For the foregoing reasons, we respectfully submit that the judgment of the lower Court should be reversed.

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